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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re the Marriage of SERGIO RIZO and YOLANDA RIZO.	
SERGIO RIZO, Plaintiff and Appellant, v. YOLANDA RIZO, Defendant and Respondent.	F063200 (Super. Ct. No. FL-578167) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. John D. Oglesby, Judge.

Sergio Rizo, in pro. per., for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

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[*] Before Gomes, Acting P.J., Detjen, J. and Franson, J.

Representing himself, appellant Sergio Rizo appeals from a superior court order granting the motion of respondent Yolanda Rizo[1] for a change of custody of their minor child Nahum Rizo from Sergio to Yolanda.[2] The record provided to us by Sergio on his appeal does not include Yolanda's motion or any of the evidence she submitted to the court in support of that motion. Applying basic principles of appellate review, we affirm the order of the superior court.

APPELLANT HAS SHOWN NO ERROR

This appeal requires us to revisit and restate some basic, fundamental principles of appellate review of a trial court judgment.

First:

> "'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; accord, *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140.)

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[1] Respondent filed no brief, which dictates that we "decide the appeal on the record, the opening brief, and any oral argument by the appellant." (Cal. Rules of Court, rule 8.220(a)(2).) Appellant waived oral argument.

[2] Because appellant Sergio Rizo, respondent Yolanda Rizo and their child Nahum Rizo all share the same last name, we sometimes in this opinion refer to them by their first names "as a convenience to the reader." (*In re Marriage of Graham* (2003) 109 Cal.App.4th 1321, 1323, fn. 1.) "We do not intend this informality to reflect a lack of respect …." (*Ibid.*) Also, "[a]s distinguished from other civil cases where the parties may be partnerships, corporations, associations or governmental entities, the parties in marital dissolution actions are human beings and we use their first names, in part, to humanize a decision resolving personal legal issues which seriously affect their lives." (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 475-476, fn. 1.) We of course recognize that few things, if any, more seriously affect the life of a litigant or of the litigant's child than custody of that child.

"'It is well settled that all presumptions and intendments are in favor of supporting the judgment or order appealed from, and that an appellant has the burden of showing reversible error, and that, in the absence of such showing, the judgment or order appealed from will be affirmed….' [Citations.]" (*Walling v. Kimball* (1941) 17 Cal.2d 364, 373, quoting *Hibernia Sav. etc. Soc. v. Ellis Estate Co*. (1933) 132 Cal.App. 408, 412; accord, *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 261.) "[A]n appellant '"must affirmatively show error by an adequate record…. 'A judgment … is *presumed correct.* All … presumptions are indulged in to support it on matters as to which the record is silent ….' (Orig. italics.)" [Citation.]'" (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532.)

> "All presumptions indulged in are in favor of the regularity of the judgment and proceedings upon which it is based, hence it devolves upon an appellant to affirmatively show the existence of the error upon which he asks for a reversal." (*Scott v. Hollywood Park Co*. (1917) 176 Cal. 680, 681; see *Dahlberg v. Dahlberg* (1927) 202 Cal. 295, 297.)

'"'"[E]rror must be affirmatively shown."'"' (*Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 443.) "The burden rests upon the party complaining not only to show error but also to show that the error is sufficiently prejudicial to justify a reversal." (*Coleman v. Farwell* (1929) 206 Cal. 740, 741.)

Second: "When an appellant decides to represent himself in propria persona, 'he is entitled to the same, but no greater, consideration than other litigants and attorneys. [Citations.]'" (*Bistawros v. Greenberg* (1987) 189 Cal.App.3d 189, 193; accord, *Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 638, disagreed with on another ground in *Dumas v. Stocker* (1989) 213 Cal.App.3d 1262, 1269, fn. 13; *Bianco v. California Highway Patrol* (1994) 24 Cal.App.4th 1113, 1125.) "'[T]he in propria persona litigant is held to the same restrictive rules of procedure as an attorney.'" (*Bianco v. California Highway Patrol*, *supra*, at pp. 1125-1126; see also *First American Title Co. v. Mirzaian* (2003) 108 Cal.App.4th 956, 958, fn. 1.) This holds true both in the appellate courts (see *Bistawros*,

supra, at p. 193), and in the trial courts. "A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation." (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 985.)

Third, "'[a]n appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been but was not presented to the lower court by some appropriate method .... The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the headings of estoppel or waiver .... Often, however, the explanation is simply that it is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial.' [Citation.]" (*Doers v. Golden Gate Bridge Etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1 (*Doers*); in accord, see also 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 400, pp. 458-459, and the numerous authorities cited therein.)

Sergio first contends that the attorney who had been appointed to represent the child, Ms. Dawn Bittleston, "gave perjured testimony and created an actual conflict of interest by representing the respondent rather than the children …." (Full capitalization omitted.) He fails to call our attention, however, to any testimony at all given by Ms. Bittleston, and we see none in the record on appeal. Even if Ms. Bittleston had given testimony, the task of determining the credibility of any witness belongs to the trier of fact, not to one of the interested parties. That is why we have trial courts. Sergio's conflict of interest argument is that the child's counsel was somehow legally barred from advocating that Yolanda should be given custody of Nahum. Sergio appears to contend that Ms. Bittleston could only either (a) argue that appellant retain custody, or (b) make no argument at all. He does not and cannot cite any authority supporting this contention, however, because an attorney represents his or her own client, not someone else. Here,

Ms. Bittleston represented Nahum, not appellant. Simply asserting that Ms. Bittleston represented Yolanda does not make it so.

Sergio's argument that Judge Oglesby should have disqualified himself is waived (or "forfeited" - see *Keener v. Jeld-Wen, Inc., supra,* 46 Cal.4th at p. 262, fn. 19) because Sergio made no motion to disqualify Judge Oglesby. (*Doers, supra*, 23 Cal.3d 180; see also *People v. Webb* (1993) 6 Cal.4th 494, 522-523, and *People v. Hull* (1991) 1 Cal.4th 266, 268, regarding the proper procedure for appellate review of the determination of the question of the disqualification of a judge.) We also observe that although Sergio contends that Judge Oglesby was biased against him, the reporter's transcript of the July 12, 2011, hearing shows that there had already been a May 27, 2011, order changing custody of Nahum from Sergio to Yolanda, that Sergio filed a motion entitled "Annulment of Previous Order Based on Perjury by Children's Counsel," and that Judge Oglesby generously viewed Sergio's motion as a motion for relief under Code of Civil Procedure section 473 due to mistake, inadvertence, surprise or excusable neglect after Sergio had failed to appear at the prior hearing on Yolanda's motion for change of custody. Judge Oglesby then granted Sergio's motion for relief, vacated the May 27 order, and heard anew Yolanda's motion for change of custody of Nahum. The court thus ensured that Sergio had the opportunity to present whatever argument and evidence he wished to present in opposition to Yolanda's motion for change of custody.

DISPOSITION

The court's order granting a change of custody from appellant to respondent is affirmed.